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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-672

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

IRVING D. AARON, *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

For the reasons set forth herein, Respondents pray that the Writ of Certiorari sought by Petitioner not be issued and that the decision of the Court of Appeal (Second Appellate District) of the State of California remain undisturbed.

JURISDICTION.

A. The Petition Was Not Timely Made.

Petitioner erred when on page 2 of its Petition it stated that the decision of the Court of Appeal was entered on September 4, 1974. The Remittitur was issued on September 3, 1974, and possibly it was received by Petitioner on September 4, 1974.

The decision of the Court of Appeal (Second Appellate District) of the State of California was entered on July 3, 1974. (Appendix B, Petitioner's Petition, p. 2 of Appendices.)

The Supreme Court of the State of California denied a Petition for Hearing on August 28, 1974. (Petitioner's Petition, p. 1.)

No other hearings or motions have been either sought or made in any court other than Petitioner's Petition to this Court for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The provisions of 28 USC 2101(c) pertinent to Respondents' contention read as follows:

> ". . . any writ of certiorari to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be applied for within 90 days after the entry of such judgment or decree . . ."

Respondents submit that since the Judgment Petitioner asks this Court to review is the Judgment of the California District Court of Appeal which was entered on July 3, 1974, under Rule 34(1) of this Honorable Court, the 90-day period of time referred to in 28 USC 2101(c) began to run on July 4, 1974 and expired on October 1, 1974. Petitioner filed the Petition herein with the Clerk of this Honorable Court on November 29, 1974.

Respondents concede that had the California Supreme Court granted Petitioner's Petition for a hearing, a new date for computing time would have come into being. Such, however, is not the case. Since the State Supreme Court denied the Petition to hear the matter, the final decision of the State Court to be reviewed by this Honorable Court is that of the Appellate Court of the State of California. That decision was entered on July 3, 1974.

In making their contentions Respondents are guided by the guidelines set forth by this Honorable Court in the case of *Market Street Ry. Co. v. Railroad Commissioner of California*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 where this Court stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek a review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired. . . . If the rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing."

Even if for purposes of argument should Respondents concede that the Judgment sought to be reviewed was that of the California Supreme Court when it refused to review the California Appellate Court's decision, Petitioner's Petition still would be filed too late. The decision of the California Supreme Court was entered on August 28, 1974. The ninetieth day after August 28, 1974, is November 26, 1974, three days before the Petition to this Court was filed.[1]

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[1]Just prior to the completion of this brief, Respondents were served with a Supplement to Petition in which Petitioner sought to justify its late filing of the original Petition.

Paragraph 2 of said Supplement is in error respecting the date the Appellate Judgment Petitioner seeks to review became

(This footnote is continued on next page)

B. Petitioner Has Made No Showing That the Instant Case Comes Within the Purview of 28 USC 1257(3).

1. The Validity of a Treaty, United States Statute or State Statute Has Never, at Any Time, Been Drawn in Question.

The validity of a treaty or statute of the United States has never at any time been drawn in question.

Respondents brought this action for inverse condemnation under the provisions of Article I, Section 14 of the California Constitution which provides, *inter alia:*

> "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner. . . ."

The Petitioner has never contended that the foregoing state constitutional provision is ". . . repugnant to the Constitution, treaties or laws of the United States . . ."

The only defendant in this lawsuit is the City of Los Angeles. It would thus appear that the only basis upon which the City could invoke this Court's jurisdiction, under 28 USC 1257(3), is its contention that

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final. Rule 24 of California Court Rules states, in part, ". . . A decision of a Court of Appeal becomes final as to that court 30 days after filing. . . ." Thus, even if this Honorable Court were to accept the California Rule as stated above as determinative of its own jurisdiction, the date of final decision would have been August 2, 1974, and the ninetieth day thereafter would have been October 31, 1974.

Contrary to Petitioner's contention on page 3 of Supplement to Petitioner's Petition, Respondents were not served prior to the expiration of the ninety-day period. Moreover, Respondents submit that, other than the necessity of service as required by Rule 33 of this Court, the date of service by mail is not material to the question of what the effective filing date might be. Pursuant to Rule 21(3) Respondents have been notified that the Petition was docketed in this Court on November 29, 1974.

merely because aircraft flowing through the lanes of interstate commerce land and take off from the airport it owns and operates, it is privileged or immune from complying with Article I, Section 14 of the California Constitution.

2. The Effect of Griggs v. Allegheny.

It is axiomatic that this Honorable Court can decline jurisdiction if the federal question the Petitioner seeks to raise has ceased to be substantial because it has already been settled by a previous decision of this Court.

Respondents submit that this Court had already decided the federal question which Petitioner sought to raise below in the case of *Griggs v. Allegheny County*, 369 U.S. 84.

3. The Only Question of Substance Before the Courts Below Was a Non-Federal Question.

In the case of *Honeyman v. Hanan*, 300 U.S. 14, 18 this Honorable Court stated:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented to the highest court of the State having jurisdiction *but that its decision of the federal question was necessary to the determination of the case.*" (Emphasis our own.)

Respondents submit that the State Court did not have to decide a federal question necessary to the determination of the case because:

1. The only relief sought by the Respondents was enforcement of their state constitutional right to

compensation when their property was taken or damaged by the City of Los Angeles for a public use.

2. No relief was sought or granted which would in any way impair the use of the air lanes by either the City of Los Angeles or the planes using them in landing or taking off or in any manner restrict flight to or from the Los Angeles International Airport.

The only question of substance before the state courts was whether or not the Petitioner did in law and fact damage or take Respondents' properties without the payment of just compensation in violation of the California Constitution. This is clearly a non-federal question.

The ruling of the California District Court of Appeal was as follows:

> ". . . we hold that the municipal operator of an airport is liable for taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking." (See Appendix B, Petitioner's Petition, p. 32 of Appendices.)

Even if for purposes of argument, Respondents were to concede that the record shows a federal question had been presented, Respondents submit that the rule of

Browne v. Union Pacific R.R. Co., 267 U.S. 255, as quoted below, is applicable:

> "It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

ERROR IN PETITIONER'S DESCRIPTION OF QUESTIONS PRESENTED.

Petitioner predicates the questions it seeks to present to this Court on its statement that:

> "The judgment in the case at bar directs recovery against the City of Los Angeles in favor of property owners in the vicinity of Los Angeles International Airport due to noise emanating from jet aircraft operating at the Airport." (Petitioner's Petition, p. 2.)

The foregoing statement is not only in error, but, in the opinion of Respondents, is grossly misleading. In this case Respondents neither sought, nor were awarded, damages for noise.

The crux of the Respondents' Complaint was that the City of Los Angeles, as owner and operator of the Los Angeles International Airport, was liable to them, by way of inverse condemnation, to the extent that their properties had been reduced in market value by reason of the noise of jet aircraft taking off and landing at the airport.

A succinct statement which illustrates this very important distinction is made by the learned Trial Court

(pp. 37 and 38, Appendix "B", of Petitioner's Petition) wherein Judge Jefferson stated:

> "Plaintiffs do not seek damages because of any personal injury, discomfort, or annoyance. Although the testimony establishes that jet noise interrupted normal conversation, radio and television reception and sleep, at times, no claim is asserted for these results as such. The evidence as to the effects of jet noise upon personal comfort, enjoyment or convenience in living was offered as a factor tending to show these effects caused a reduction in the fair market value of the respective parcels of real property. What plaintiffs seek in this action are money damages measured by the extent to which the market value of the respective parcels of property has been reduced because of noise from jet aircraft flying over and near these parcels located within and near the landing and takeoff patterns".

STATEMENT OF THE CASE.

The following Statement of the Case is made because Respondents deem it necessary to correct the many inaccuracies and omissions, which in the opinion of Respondents, Petitioner has made in its presentation of same.

Respondents feel that they must point out that the record is totally bare of the proof of the matters Petitioner described beginning with the second paragraph of page 4 through page 6 of its Brief. Respondents submit that even though they may well be true they have nothing whatever to do with the issues of this case.

Respondents offer the Statement of Facts of the Court of Appeal of the State of California, Second Appellate District, as an accurate statement of the case.[2]

In addition, Respondents wish to comment upon another error in Petitioner's Statement of the Case. In the last paragraph thereof, page 6 of Petitioner's Statement of the Case, Petitioner contends that on the authority of *Griggs v. Allegheny, supra,* the City of Los Angeles "has been held *solely* liable for the consequences of jet noise." (Emphasis our own.)

The foregoing contention is in error in at least two very important respects:

"[2]FACTS

Between 1959, when jet aircraft first began using LAX, and 1965, the City permitted gradually increasing numbers of jet flights to and from the airport.[1] These aircraft emit loud and disturbing noises. An acoustical expert with the consulting firm of Bolt, Beranek and Newman prepared a study for the Federal Aviation Administration entitled "1965, 1970, and 1975 Noise Exposure Forecast Areas for Los Angeles International Airport." The purpose of the study was to determine the effects of aircraft noise on land use in areas surrounding the airport. The effective perceived noise level (EPNL), which measures the annoyance caused by such noise, was determined based on known noise levels of the engines, altitudes, distances, flight paths, and take-off and landing patterns. Adjustments were made to reflect the number of flights per day and the timing of the flights, since frequent flights and nighttime flights are more annoying to residents. Based on these values three noise exposure forecast (NEF)

(This footnote is continued on next page)

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[1]The number of jet aircraft landing at Los Angeles International Airport was as follows:

Year	Yearly Number	Average Daily Landings
1960	20,171	55
1961	33,932	93
1962	47,215	129
1963	59,776	164
1964	69,503	191
1965	86,855	238

1. Neither the trial court nor the District Court of Appeal ever interpreted *Griggs, supra,* as standing for the proposition that *sole* liability for noise emanating from jet aircraft rests with the operator of the airport.

2. Neither the trial court nor the District Court of Appeal ever interpreted *Griggs, supra,* as standing for the proposition that *any* liability for noise, *per se,* emanating from jet aircraft rests with the operator of the airport.

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areas were determined.[2] NEF area C was the one in which jet aircraft noise had the greatest effect upon people below. Single family construction is not recommended in NEF area C because noise is likely to constitute a severe interference with the use of land for that purpose. The bulk of the properties originally involved in this suit are in NEF area C.

A few of the individual plaintiffs testified about the disturbing and annoying effects which the jet noise had on conversations, radio and television viewing and sleep. There was also some testimony that soot, oil and fuel from the aircraft fell on some of the parcels involved causing damage to painted surfaces and preventing homeowners from keeping their cars uncovered or drying clothes in their yards. However, recovery is not sought for the noise and other inconveniences as such, but rather for the diminution in property value caused by them.

Most of the trial was occupied by the testimony of a team of appraisers for plaintiffs. They visited the properties of the named plaintiffs in 1963, heard the jet noise themselves, and prepared appraisals of the properties involved. They appraised the market value of these properties and what their market value would have been if unaffected by jet noise, based on sales of comparable properties in other areas. The trial court determined that 581 of the parcels had been damaged and their market value reduced by the jet noise.[3] The reductions in market value ranged from $400 to $6,000 but were preponderantly in the neighborhood of $1,000. In the judgment the court also granted an easement to the City for flights of jet aircraft in the air space over and near the properties involved, to the extent of such usage in May 1963, which was determined to be the time of the taking or damaging of property in this case."

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[2]For a readable explanation of this noise measurement technique, see Comment, *Port Noise Complaint* (1970) 6 Harv. Civ. Rts.-Civ. Lib. L.Rev. 61, 65-74.

[3]This case originally involved some 750 parcels. The trial court found that some of them had not been damaged. Furthermore, as to 61 of the 581 damaged parcels, the plaintiffs presented inadequate proof of ownership and therefore compensation was granted only as to 520 parcels.

All references to *Griggs, supra,* made in the published opinions of the Trial Court and the District Court of Appeal and the propositions for which it is cited follow (the page numbers refer to the page numbers of Appendices attached to Petitioner's Petition):

Pages 7-8: The municipal operator has the responsibility to acquire and pay for the air easements necessary for the operation of the airport.

Page 22: "The fact that the City plans, builds and operates the airport is sufficient to impose liability."

and

"The fact that flights are within the navigable air space does not immunize the owner and operator of an airport for failure to appropriate the land and air space necessary to provide an adequate approach way.

Page 28: "Although many parties other than the City may have helped to create the problem, the City's role as planner, owner and operator of the airport is sufficient to require it to compensate plaintiffs *in this case.*" (Emphasis our own.)

Page 64: The United States Supreme Court in *Griggs, supra,* rejected the airport operator's defense that it could not be held liable because it had no control over the airline's choice of aircraft engines or the flight altitudes on the glide paths to and from the airport.

REASONS FOR REFUSING THE WRIT.

A. Introduction.

Respondents have heretofore in this brief raised the *following jurisdictional* objections:

1. The Petition was not filed in time.
2. Petitioner has failed to show circumstances which permit it to invoke jurisdiction under *28 USC 1257(3)*.

Respondents will now proceed to a discussion of errors in the reasons advanced by Petitioner to support its contention that a writ should issue.

B. The Preemption Doctrine Does Not Act to Preclude Liability of the Airport.

1. Petitioner Makes No Showing That Congress Intended to Preempt State Action in the Form of Relief Granted in the Instant Case.

Beginning on page 10 and continuing through about one-fourth of page 11 of its Petition, Petitioner contends that certain express provisions of the Federal Aviation Act of 1958 indicate a Congressional intention to preempt the area in which the California courts have acted in the instant case.

Petitioner cites the direction to the Administrator to prescribe air traffic regulations . . ."for the protection of persons and property on the ground . . ." *49 USC Sec. 1348(c)*, together with the Congressional directions to the Administrator to prescribe ". . . such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise . . ." *49 USC Sec. 1431* as authority for its conclusion that all consequences of jet noise have been preempted by the United States.

But, in so doing Petitioner pointedly ignores *49 USC Sec. 1506* which states:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in *addition* to such remedies." (Emphasis our own.) *49 USC Sec. 1506.*

On page 11 of its Petition, Petitioner refers to a Senate Report on the 1968 Legislation which, in turn, refers to a portion of a letter from the Secretary of Transportation, which, in turn, refers to the case of *American Airlines v. Town of Hempstead,* 272 F.Supp. 226, presumably in support of Petitioner's argument of the Congressional intent necessary to establish pre-emption.

Because of its hearsay-on-hearsay character Respondents question the value of such a letter when offered as proof of Congressional intent. However, Respondents do believe that the statement of law made by the Court in *American Airlines v. Town of Hempstead* is a very accurate description of what the Court of Appeal (Second Appellate District) and the trial court in the instant case and the Respondents believe it to be. It follows:

> ". . . the case is not involved with landowners' rights, or with concepts of trespass or nuisance. The ordinance is not an exercise of landowners' rights, but it is, if valid, an exertion of police power purely as such; . . . So far as landowners are concerned, they are constitutionally entitled to just compensation if overflights are such in nature, proximity and frequency as to amount to a taking of the property for public purposes (*United States*

v. Causby, 1946, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206; Griggs v. Allegheny County, 1962, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585); but that does not constrict the federally granted public right of freedom of transit through air space, including that needed for safe landing and take-off, . . ."

American Airlines v. Town of Hempstead, 272 F.Supp. 226, 231.

Respondents submit to this Honorable Court that the foregoing is not only a proper statement of the law, but also, that it is a most compelling and persuasive argument against Petitioner's contention that the preemption doctrine acts so as to preclude liability of the airport operator.

2. Application of the Tests of Rice v. Santa Fe to the Facts of the Instant Case Do Not Support Petitioner's Theory of Federal Preemption.

On page 13 of its Petition, Petitioner accurately sets forth three classic tests for determining whether the Federal Government has preempted an area.

But from there on forward, *i.e.*, page 13 through page 19, Petitioner cites case after case, *all of which miss the mark.* Petitioner, by citing those cases, proves over and over something which Respondents have always conceded, *i.e.*, that local governments are precluded by reason of federal preemption from any attempts to control noise from aircraft by attempting to impose curfews, regulate the quantum of noise they emit, or any other similar exercise of police power.

C. Requiring the Municipal Operator of an Airport to Comply With Its Constitutional Duty to Pay Just Compensation to the Owners of Land It Takes or Damages Will Not Result in an Undue Burden on Interstate Commerce.

The fulcrum upon which Petitioner's contention rests is stated by it on page 21 of its Petition as follows:

> "It necessarily follows that the imposition of severe financial liability results in an undue burden on interstate commerce."

Apparently the thrust of Petitioner's argument is that compliance with the state law is so expensive that it should be permitted to ignore it. But what is the state law from which Petitioner feels it must be shielded? Is it confiscatory? The answer to the rhetorical question posed above is "no." Surely compliance with *Article I, Section 14 of the California Constitution* cannot be construed as thrusting a burden on the flow in interstate commerce.

Section 1239.3 of the *Code of Civil Procedure* of the State of California provides:

> "Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport. (Added by Stats. 1965, c. 1564, p. 3653, Sec. 1.)"

If this Honorable Court were to accept Petitioner's theory that compliance with Article I, Section 14 of the California Constitution creates an "undue burden on interstate commerce" the net effect of such a ruling would be to permit all airport operators within the State of California to take air easements anywhere within the state and escape liability from the landowners merely by leasing their facilities to interstate air carriers.

D. Re Local Control of Noise.

Petitioner, pages 22 and 23 of its Petition, attempts to read into the California decision an attempt to control aircraft noise. As hereinbefore set forth the decision appealed from dealt only with property rights.

E. There Is No Necessity to Review Griggs v. Allegheny.

Griggs was decided in 1962. Respondents filed their action during April, 1964 for damages to or taking of property, during 1963. The Trial Court found, and the District Court of Appeal affirmed, that the act of inverse condemnation took place during May, 1963.

Petitioner's contentions, pages 24 through 27 of its Brief, relate only to the action of Congress and the Courts to assure federal control of the use of the airlanes and, since 1972, aircraft noise abatement.

No citation, of statute or decision, is given by Petitioner to justify modification of the holding of the *Griggs* case.

Petitioner alludes to a possible defect in parties in that the airlines were not in the action. Note is made that such affirmative defense was alleged by Petitioner and was stricken prior to trial.

It is submitted that Petitioner could have, should it have so desired, cross-complained against the airlines, or others, in this action, but failed to do so.

Conclusion.

Writ of Certiorari should not issue for the following reasons:

1. The Petition was not timely filed.
2. The case does not fall within the requirements of 28 USC 1257(3).
3. There is no special or important reason for the review of *Griggs v. Allegheny*.
4. The law, as heretofore described, has been properly applied in the instant case.

Respectfully submitted,

JAMES E. SLOAN,
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